90-1742

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989-90

(Released March 30, 1990)

3 Div. 91

John Edward Hooper

v

State

Appeal from Escambia Circuit Court
CC-85-62

BOWEN, JUDGE

John Edward Hooper was convicted of two counts of second degree rape and was sentenced to five years' imprisonment on each conviction. Although Hooper raises nine issues in this appeal from his convictions, we need address only two.

Hooper was originally tried and convicted of these crimes in September 1985. His convictions were subsequently reversed

because the prosecutor had asked improper questions of character witnesses on cross-examination. Hooper v. State, 523 So.2d 469 (Ala.Crim.App. 1986). Hooper was retried and was again convicted in September 1988. Prior to his second trial, the prosecutrix, Hooper's daughter, recanted her allegations.1 She also refused to testify against Hooper at the retrial. It is undisputed that before the second trial the State was aware that she had recanted her stories and would not testify against him.

The prosecutrix was the first witness to testify at the retrial. At the request of the State and over Hooper's objection, she was called as the court's witness and, in response to specific questions posed by the

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1 The prosecutrix had initially made a complaint against Hooper in January 1985, at which time she was 13 years old. It appears from the record that, beginning the month after making her complaint, she has periodically recanted her story.

court, flatly denied that Hooper had committed the acts with which he was charged. Hooper then made a motion for judgment of acquittal, which was denied. The State was thereafter permitted to cross-examine the prosecutrix with respect to her testimony at the first trial. In this manner the State elicited that the prosecutrix had previously testified that Hooper did engage in sexual intercourse with her on the dates alleged in the indictment. The State also elicited the prosecutrix's testimony from the first trial concerning the details of these acts and other sexual acts between her and Hooper.

At the second trial, a school counselor, a social worker, and three friends of the prosecutrix testified that the prosecutrix had told them that Hooper had engaged in sexual intercourse with her. A clinical psychologist, who had interviewed the prosecutrix only once, was called by the

State and testified that the prosecutrix exhibited characteristics of a sexually abused child. There was no eyewitness testimony and the medical evidence indicated only that the prosecutrix's physical condition was consistent with having engaged in sexual intercourse.2 At the second trial, the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to the counselor, the social worker and the three friends.

Hooper's renewed motion for judgment of acquittal, made after the prosecution rested, was denied by the trial court. In his defense, Hooper denied raping or otherwise sexually molesting his daughter.

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2 The prosecutrix testified at the second trial that, prior to 1985, she had had sexual intercourse three or four times with one of her brother's friends. This friend was called as a prosecution witness and denied having ever engaged in sexual intercourse with the prosecutrix.

I

Hooper contends, and we agree, that the trial court erred in giving the following instruction to the jury:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

This instruction was given at the State's request and in reliance on dicta contained in this court's opinion in Randolph v. State, 348 So.2d 858 (Ala.Crim.App.), cert. denied, 348 So.2d 867 (Ala. 1977).

Contrary to the dicta contained in Randolph, 348 So.2d at 866, the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): "The general rule in this jurisdiction is that the testimony given on a former

trial by a witness at the last trial in only admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence." (Emphasis added.) Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, "not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment") (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 605, 608 (1919) ("In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose") (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81 So. 591, 592 (1919) (in suit for malicious prosecution, it was reversible error to admit

testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testimony from a prior trial is admitted, the jury should be clearly instructed that this testimony may be considered for impeachment purposes only and not as independent or original evidence. See Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888).

The rationale advanced by the Alabama courts for holding prior inconsistent statements, even those given as testimony in a prior proceeding, inadmissible as substantive evidence is that such statements are "purely hearsay." Corona Coal & Iron Co. v. Callahan, 202 Ala. at 650, 81 So. at 592.

Accord, Thompson v. Richardson, 96 Ala. at 492, 11 So. at 729 ("merest hearsay"). The Federal Rules of Evidence offer a different view with regard to prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition." Fed.R.Evid. 801(d)(1)(A). Rule 801(d)(1)(A) provides that such a statement is not hearsay where made by a witness who testifies at the present trial and who is subject to cross-examination concerning the prior statement. Several states have adopted this federal rule or a version thereof. See generally 4 D. Louisell & C. Mueller, Federal Evidence §410 (1980 & Supp. 1989) (State Adoptions of Rule 801).

In Randolph v. State, 348 So.2d at 863-64, this court reversed the defendant's conviction because the trial court had failed to specifically instruct the jury that the

prior inconsistent testimony of the State's primary witness, which had been offered for impeachment purposes, could not be considered as substantive evidence. Through an opinion authored by the late Leigh M. Clark, Supernumerary Circuit Judge, we then went on to question the soundness of this aspect of Alabama law. We noted that there is "widespread dissatisfaction with the traditional rule," which is followed in Alabama, and that many judges and scholars "have pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Gamble, Howard, & McElroy, The Turncoat of Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983) (footnotes omitted) (citing Randolph, 348 So.2d at 864). We also discussed Federal Rule 801(d)(1)(A) and the history of its adoption. Randolph, 348 So.2d

at 865-66. Recognizing the incongruity in permitting a witness's prior testimony to be admitted as substantive evidence when the witness is unavailable at the second trial, but not when the witness changes his or her testimony, we indicated our preference for permitting the introduction of a witness's prior inconsistent statement as substantive evidence when the prior inconsistent statement was "made while testifying under oath on a former trial, with the opportunity for cross-examination." 348 So.2d at 866. We offered two "[s]olid and cogent reasons," Id., for our preference:

> "(a) [T]he prior statement was made nearer in time to the occurrence, event, or other matter to which it relates, and therefore when the witness' recollection would be fresher and better, and
>
> "(b) [T]he prior statement is less likely to have been influenced by pressure arising from the controversy, including the cajolery or corruption of, or other tampering with, the witness." Id.

However, our reversal of Randolph's conviction was grounded on existing Alabama law and the remainder of our discussion in that case was purely dictum. Dictum, of course, is merely persuasive and has no precedential value. See Knight v. State, 273 Ala. 480, 486, 142 So.2d 899, 905 (1962); Roquemore v. Sovereign Camp W.O.W., 226 Ala. 279, 282, 146 So. 619, 622 (1933). While we continue to adhere to the view that the Alabama Supreme Court should adopt the federal rule or some version thereof,3 this

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3 As discussed in Randolph, the original proposal of Rule 801(d)(1)(A) required that the prior inconsistent statement have [sic] been made under oath and subject to cross-examination. 348 So.2d at 865. Rule 801(d)(1)(A), as ultimately enacted, does not require that the prior statement have [sic] been subject to cross-examination, nor is it restricted to statements made at a prior trial. In any event, as noted below, this court is without authority to effect a change in this aspect of Alabama law. In view of this fact, we see little point in entering upon a discussion of the relative merits of the federal rule as opposed to the modified rule proposed in

court is not at liberty to take such action. The Alabama Supreme Court cases cited at the outset of this discussion have not been overruled or otherwise modified by that court.4 This court is bound by the decisions of the Alabama Supreme Court, §12-3-16, Ala. Code (1975), and may not "overturn or change [those decisions] in any manner." Passmore v. State, 47 Ala.App. 189, 191, 252 So.2d 115, 116 (1971) (emphasis added). In light of those cases, we have no alternative to the

Randolph. We do note that the Randolph proposal was greeted with approval by commentators. Gamble, Howard, & McElroy, supra, at 16-21.

4 The Supreme Court denied the petition for writ of certiorari filed by the State in Randolph, without opinion or comment. Ex parte State ex rel. Attorney General, 348 So.2d 867 (Ala. 1977). The denial of a petition for writ of certiorari "does not necessarily indicate [the Supreme Court's] approval of all the language used or all of the legal conclusions contained in the opinion sought to be reviewed." Morrison v. Morrison, 287 Ala. 343, 251 So.2d 764, 765 (1971).

conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence.

II

Hooper asserts that the evidence was insufficient to sustain his convictions. In light of our discussion in Part I, above, we are constrained to agree.

In order to convict Hooper of second degree rape, the State had to prove that Hooper engaged in sexual intercourse with the prosecutrix while she was between the ages of 12 and 16. See §13A-6-62, Ala. Code (1975). As previously noted, the only evidence

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Accord, Ex parte Glasco, 513 So.2d 61 (Ala. 1987); Ex parte McDaniel, 418 So.2d 934, 935 (Ala. 1982). A "denial of certiorari should never be considered as an expression by the reviewing court on the merits of the controversy." Ex parte Buse, 549 So.2d 1344 (Ala. 1989). We certainly cannot construe the denial of the writ in Randolph as an implicit overruling of the Supreme Court cases cited earlier.

incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to a school counselor, a social worker and three of her friends.5 In fact, the only actual evidence that a crime had been committed was the prior inconsistent testimony and statements. The substantive evidence contained in this record is the prosecutrix's testimony that Hooper did not not commit the acts charged in the indictment. Under these facts, we must conclude that the evidence was insufficient to sustain the convictions.

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5 The extrajudicial statements to the counselor, social worker, and friends clearly were admissible only for impeachment purposes and not as substantive evidence. E.g., Ex parte Brown, 499 So.2d 787, 791 (Ala. 1986); Cloud v. Moon, 290 Ala. 33, 37, 273 So.2d 196, 199 (1973); Isbell v. State, 57 Ala.App. 444, 450, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140 (1976). The State does not contend otherwise.

Where an appellate court concludes that the evidence is insufficient to sustain a jury verdict, the Double Jeopardy Clause of the Fifth Amendment prohibits a retrial of the defendant on the same charge. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978). We are aware that the United States Supreme Court has also held that "the Double Jeopardy Clause allows a retrial where the reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against the defendant, even where the court also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction. Lockhart v. Nelson, 488 U.S. _____, _____, 109 S.Ct. 285, 290, 102 L.Ed.2d 265 (1988)." Fortier v. State, [Ms. 6 Div. 776, Feb. 23, 1990] _____ So.2d _____, _____ (1990). However, we find Lockhart distinguishable from the case

at bar.

In Lockhart, there was other evidence, aside from the inadmissible evidence, against the defendant. The defendant, Nelson, was given an enhanced sentence under an Arkansas statute which required the prosecutor to prove beyond a reasonable doubt four prior felony convictions. The prosecutor introduced evidence of four prior convictions; however, one of these convictions had been pardoned by the governor, and was therefore null and void. Although Nelson stated at the sentencing hearing that he though the conviction had been pardoned, there was no actual objection to the introduction of the conviction. 488 U.S. at _____, 109 S.Ct. at 288. Therefore, the Court was able to conclude:

> "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an

> opportunity to 'obtai[n] a fair readjudication of his guilt free from error.' Had the defendant offered that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon." 488 U.S. at _____, 109 S.Ct. at 291 (citations omitted) (emphasis added).

In the case at bar, the only indication that Hooper had committed the crime with which he was charged (in fact, the only indication that a crime had been committed at all) was the prior inconsistent testimony of the prosecutrix. While this evidence was admissible for impeachment purposes, it was not admissible as substantive evidence and on this ground Hooper objected numerous times to its admission. Had the trial court properly excluded this

evidence from consideration as substantive evidence, the State, in this particular rape trial, simply had no case. The substantive evidence contained in the record is the prosecutrix's testimony that there were no acts of sexual intercourse between her and Hooper.

Remanding a case for retrial under Lockhart "recognizes that the State may have additional evidence that it did not produce in reliance upon the strength of the erroneously admitted evidence.... However, where it appears from the record that the State produced all available significant evidence at trial and the State does not suggest it has more, an appellate court should remand for the entry of a judgment of acquittal." State v. Baker, 228 N.J.Super. 135, 549 A.2d 62, 66 (1988). Cf. Isbell v. State, 57 Ala.App. 444, 450-51, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140

(1976) (where the only evidence incriminating to the defendant was the prior inconsistent statement of a prosecution witness, "a limiting instruction would not be appropriate, since the insufficiency of the evidence would not justify the case being submitted to the jury, unless it be submitted on the affirmative charge requested by the defendant").

For the reasons stated above, the judgment of the Escambia Circuit Court is reversed and the cause remanded for the entry of a judgment of acquittal.

REVERSED AND REMANDED.

All Judges concur.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

(Released December 14, 1990)

89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

v.

State)

Escambia Circuit Court
(CC-85-62)

MADDOX, JUSTICE.

The State asks us to overturn prior cases holding that testimony given under oath at a prior trial and subject to the penalty of perjury is admissible for the purpose of contradiction or impeachment but not as substantive evidence.

The Court of Criminal Appeals, noting that it was "bound by the decisions of [this Court]," held that it had "no alternative to the conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence."[1] We reverse and remand.

John Edward Hooper was initially convicted of two counts of second degree rape of his daughter. On his appeal of those convictions, the Court of Criminal Appeals reversed the convictions because the

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[1] The issue was deliberately presented by the State, when, at the trial, the State, relying on dicta in Randolph v. State, 348 So.2d 858 (Ala.Cr.App.), cert. denied, 348 So.2d 867 (Ala. 1977), requested that the trial court instruct the jury that the testimony of the prosecutrix given in a prior trial, under oath and subject to cross-examination, could be used as substantive evidence of the facts stated in the testimony. See Hooper v. State, [Ms. 3 Div. 91, March 30, 1990] _____ So.2d _____ (Ala.Cr.App. 1990).

prosecutor had asked improper questions of character witnesses.

The case was retried, and at the retrial, Hooper's daughter, the prosecutrix, recanted her story. The State questioned the daughter about her previous testimony and, thus, introduced into evidence all of her prior testimony concerning the alleged sexual abuse. The trial court, at the request of the State, specifically instructed the jury that it could consider that prior inconsistent testimony as substantive evidence upon which it could base a conviction.2 The jury

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2 The trial judge gave the following instruction:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

found Hooper guilty on both counts.

The Court of Criminal Appeals reversed Hooper's convictions, stating:

> "Contrary to the dicta contained in Randolph [v. State], 348 So.2d [858] at 866 [Ala.Cr.App. 1977], the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): 'The general rule in this jurisdiction is that the testimony given on a former trial by a witness at the last trial is only admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence.' (Emphasis added). Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, 'not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment') (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 695, 608 [sic] (1918) ('In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose') (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81

> So. 591, 592 (1919) (in suit for malicious prosecution, it was reversible error to admit testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testimony may be considered for impeachment purposes only and not as independent or original evidence. See, Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888)."

Hooper v. State, _____ So. 2d at _____.

Even though the Court of Criminal Appeals applied the rule of evidence contained in these prior cases, that court, nevertheless, pointed out that the soundness of the rule had been questioned in Randolph v. State, 348 So.2d 858 (Ala.Cr.App. 1977), a case that was later described as documenting "wide-spread dissatisfaction with the traditional rule" and as citing cases and writings of many judges and scholars who

"have pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Hooper v. State, _____ So.2d _____, quoting Gamble, Howard, & McElroy, The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983), which also had cited Randolph.

It is apparent that the Court of Criminal Appeals felt constrained, and rightfully so, to follow this Court's earlier cases holding that prior inconsistent statements could never be used as substantive evidence.

The rule that this Court had previously set out is clear. The reason justifying that rule is that such evidence is "purely hearsay," but courts have found little difficulty in carving out exceptions to the hearsay rule in those many instances

when the testimony, even though hearsay, is considered to be credible enough to justify its presentation to a trier of fact.

It is clear to us that the modern trend is to allow a prior inconsistent statement to be used as substantive evidence, provided, of course, that the prior inconsistent statement was given under oath, was subject to the penalty of perjury, and was made at a trial, hearing, or other proceeding, or in a deposition. This modern trend is in line with Federal Rule of Evidence 801, which provides:

> "(d) Statements which are not hearsay. -- A statement is not hearsay if --
>
> "(1) Prior statement by witness. -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...."

A number of states have adopted rules of evidence that include a rule substantially similar to Rule 801(d)(1)(A), Fed.R.Evid.

Hooper suggests that this Court should not adopt such a rule of evidence but that if a rule similar to Rule 801(d)(1)(A) Fed.R.Evid., is desirable for Alabama, then the legislature is the proper body to adopt it. We find no limitation upon this Court's power to adopt the rule by Court decision, because this Court has broad powers to adopt rules of procedure. See Amendment 328, § 6.11, Constitution of Alabama, 1901. Other state supreme courts have by case law adopted rules similar to the federal rule. See State v. Almeda, 211 Conn. 441, 560 A.2d 389 (1989), and State v. Whelan, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994 (1986); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (the Supreme Court of Georgia held that a prior inconsistent state-

ment of a witness could be used as substantive evidence even though the prior statement was not made under oath in a judicial proceeding or deposition, as the federal rule requires). The Georgia Supreme Court set forth some of the benefits from a rule allowing the use of prior inconsistent statements as substantive evidence:

> "We foresee these salutary effects:
>
> "(a) Once a declaration is made, both the State and the defense are accorded some measure of protection from the erratic or unpredictable witness, in that his declaration can be considered substantively where the witness appears and is subject to cross-examination, notwithstanding variant testimony from the stand.
>
> "(b) Similarly, both sides are assured a measure of protection against efforts to influence the testimony of a witness, as the prior declaration is no longer effectively revocable at the will of the witness.
>
> "(c) For the same considerations witnesses . are

> protected from proper attempts to influence testimony--the potential gain from that impropriety being diminished substantially by the adoption of this rule.
>
> "If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.' Judge Learned Hand, in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925)."

248 Ga. at 864, 286 S.E.2d at 722 (emphasis original).

We should not be understood as expressing any view on the question of whether a prior inconsistent statement not made under oath can be used as substantive evidence when the declarant takes the stand and is subject to cross-examination. That question is not before us.

If this case had been tried in a

federal court, it seems that the daughter's prior inconsistent statement would have been admissible as substantive evidence under Rule 801(d)(1)(A), Fed.R.Evid. We think the federal rule is a good rule, that it does not substantially prejudice the rights of a defendant to a fair trial, and that it fosters a search for the truth.

We think that it is time that this Court changed our rule; therefore, after examining the record, considering the arguments of the parties, and reevaluating the rule against using prior inconsistent statements as substantive evidence, we hereby change that rule. We hold that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or

in a deposition. All previous decisions of this Court to the contrary are hereby overruled.

The judgment of the Court of Criminal Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Shores, Houston, and Steagall, JJ., concur.

Jones, Almon, and Adams, JJ., dissent.

ALMON, JUSTICE (dissenting).

If the defendant in fact committed the offenses for which he has been convicted, his conduct is most certainly both legally culpable and morally reprehensible. It is because of the emotional reaction that such acts engender, coupled with our natural zeal to protect children and to punish those who harm them, that courts must be especially careful to remain objective when presiding over or reviewing cases of this nature. The question before us, however, is whether the State has presented legal evidence that can be considered in determining whether the State has met its burden of proof beyond a reasonable doubt. If the earlier, now recanted, testimony is "substantive evidence," a case can be submitted to the jury on that testimony alone. The rule announced by the majority is not limited to sexual offenses and will apply to all

criminal prosecutions, and, for that matter, to all civil actions.

The rule prohibiting the use of prior inconsistent statements as substantive evidence, which the majority does away with in its opinion, has been a fundamental part of the accused's right to a fair trial for over 100 years. Because of the important constitutional aspects of the rule, I cannot agree with the majority's implication that it can be abolished as readily as a rule of procedure could be or as easily as a merely arbitrary rule of evidence. In addition, I do not agree that the now-abolished rule was based solely on the hearsay rule. It was also based on the accused's right to confront and thoroughly cross-examine witnesses against him, a right guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Art. I, § 7, of the Alabama Constitution. "While

hearsay rules and the Confrontation Clause ... protect similar values, it is quite a different thing to suggest ... that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." California v. Green, 399 U.S. 149, 155 (1970).

Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 1367, at 29 (3d Ed. 1940). Cross-examination must be an adversarial proceeding to be effective. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The goals of cross-examination are best achieved by questioning the witness at the time the statement is made, in the presence of the same trier of fact who must ultimately assess the witness's credibility. The principal

virtue of cross-examination "is in its immediate application of the testing process. Its strokes fall while the iron is hot." State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

Under the change effected by the majority's opinion, the accused's opportunity to confront the witness against him in a face-to-face, adversarial proceeding, at the time the damaging statement is made, is destroyed. Instead, the accused is placed in the untenable position of cross-examining a now friendly witness regarding testimony given at a time when the witness was hostile. Instead of trying to impeach the witness's present testimony, the accused must, instead, attempt to mitigate the impact of the witness's prior statement, while at the same time trying to make the witness's present testimony appear credible. The near-impossibility of this undertaking has been

recognized by the Michigan Supreme Court:

> "No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain why [she] changed [her] story before coming to court, with the jury being left to infer that [she] might have been induced to change [her] story in the intervening months or years, for some unrevealed and sinister reason."

Ruhala v. Roby, supra, 379 Mich. at 128, 150 N.W.2d at 158.

An additional problem created by allowing prior inconsistent statements to be used as substantive evidence is that the jurors are unable to adequately assess the witness's credibility by observing her demeanor at the time the prior statement was given. Instead, they must rely on the reading of a cold written record. That is simply not sufficient. As noted by Judge Learned Hand, "the bearing and delivery of a witness will usually be the dominating

factors" in determining the witness's credibility. NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951).

The perjury question is also very troubling. If a witness testifies that a traffic light was red and then testifies that it was green, what probative effect should the law give to that witness's testimony? In mathematics when you add +1 and -1, the answer is 0. How can a nullity add any weight on the "guilty" side of the scales of justice? While we are not dealing with mathematics, I am nevertheless concerned that this kind of self-contradictory testimony can be used to overcome the presumption of innocence.

For the foregoing reasons, I must dissent.

Jones and Adams, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

vs.

State)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

Maddox, J. - Hornsby, CJ., Shores, Houston, Steagall and Ingram, JJ., concur; Adams, J., dissents.

02/08/91

Robert G. Esdale, Clerk
Supreme Court of Alabama